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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER CHIQUILLO, Defendant and Appellant.	A140204 (San Francisco County Super. Ct. No. 219701)

INTRODUCTION

Defendant and appellant Christopher Chiquillo contends his jury trial convictions for weapons offenses committed on February 10 and 11, 2013, should be reversed because the trial court erred by admitting evidence of his uncharged prior conduct involving domestic violence. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On August 27, 2013, the San Francisco County District Attorney (DA) filed a second amended information accusing defendant of making criminal threats against Elizabeth Alvarado and Vanessa Castro (Pen. Code, § 422; counts I & II).[1] The DA also accused defendant of assaulting both Castro and Alvarado with a firearm (§ 245, subd. (a)(2); counts III & IV), as well as negligently discharging a firearm (§ 246.3, subd. (a); count V), carrying a loaded firearm (§ 25850, subd. (a); count VI), and carrying a

[1] Further statutory references are to the Penal Code unless otherwise noted.

concealed firearm (§ 25400, subd. (a)(2); count VII). The DA alleged defendant committed these offenses on February 10, 2013.

In addition, the DA accused defendant of committing the following offenses on February 11, 2013: possession of a concealed firearm inside a vehicle (§ 25400, subd. (a)(1); count VIII) and carrying a concealed firearm (§ 25400, subd. (a)(2); count IX). Further, the DA alleged firearm use enhancements on the charges of making criminal threats (§ 12022.5, subd. (a)) and that defendant was not the registered owner of the firearm in regard to the carrying and possession counts (§§ 25850, subd. (c)(6), 25400, subds. (c)(6)(A) & (B)). Also, in regard to the concealed firearm counts, the DA alleged the firearm was loaded. (§ 25400, subd. (c)(6)(A) & (B).)

The evidentiary phase of the trial began on September 9, 2013. Evidence presented by the prosecution showed police officers arrived at 1227 Hampshire Street in San Francisco on February 10, 2013 about 12:30 a.m. in response to a report of shots fired. Upon arrival, the officers spoke with Vanessa Castro outside the building; Castro was scared, visibly shaken, and upset, and displayed no symptoms of intoxication. Referring to defendant, Castro stated: "My baby's father . . . just shot off some rounds and fled in a car." Castro told officers she and defendant had been in a relationship, had a two-year-old son, still lived together, but had stopped dating some time ago. Before the shooting, Castro heard a noise at the front door of the apartment, went to investigate, and saw defendant across the street standing adjacent to a vehicle she described as a grey, four-door sedan, possibly a Honda. He was talking with a young woman who was sitting in the back seat of the sedan. Castro asked defendant why he was with the girl. Defendant became angry and yelled, "You're crazy." Defendant then produced a silver handgun from his waistband and fired a few shots into the air. Castro's friend, Elizabeth Alvarado, who was inside the residence, heard the gunshots and ran outside to see what was happening. Alvarado saw defendant holding the gun so she positioned herself between defendant and Castro to protect Castro. Defendant leveled the gun at Alvarado's

torso; he then lowered the gun, pointed it at the street, and fired off another shot. Defendant put the gun away and advanced towards Alvarado. At that point, defendant's companions got out of their vehicle and physically restrained defendant. Castro went back inside the apartment to call 911 and defendant and his companions drove off in the sedan.[2]

The next day, February 11, 2013, Officer Ali Misaghi was stopped at a traffic light while on vehicle patrol in the area of Third Street and Oakdale Avenue in San Francisco. A silver VW sedan driven by defendant pulled to a stop alongside the police car. Misaghi saw defendant open a bottle of vodka and take "a big sip." Misaghi conducted a traffic stop, detained defendant, and detected the odor of alcohol on his breath. Officer Haro joined Misaghi at the scene. Haro searched defendant and located seven bullets in his jacket pocket. Misaghi assisted Haro in searching defendant further. Inside the right-front pocket of a pair of shorts defendant was wearing underneath his jeans the officers found a silver revolver capable of firing the bullets found on defendant. Subsequent testing and inspection of the weapon demonstrated it was in operable condition and the serial number had been obliterated. A search of the California Department of Justice's automated firearms system database revealed defendant owned no registered firearms.

The prosecution also presented evidence of uncharged domestic violence admitted pursuant to Evidence Code section 1109 (section 1109). In this regard, the jury heard a 911 tape relating to an incident on November 4, 2011, at around 11:30 p.m. On the tape, the caller (Castro) tells the dispatcher defendant "punched me three times in front of the baby on my head." Castro also relates she had locked herself in the bathroom and did not want to go outside. In addition, Sergeant Scott Edwards testified he responded to the 911

[2] The evidence also showed two residents of neighboring properties called 911 to report shots fired around this time, and the video tape from the security camera located outside the main entrance of the apartments at 1227 Hampshire Street shows a "silver type of sedan" arriving between 12:15 a.m. and 12:25 a.m. and defendant exiting the vehicle.

call, spoke to Castro and another woman, and observed Castro had redness to her forehead. Castro told Edwards defendant struck her. As Edwards was speaking to the two women, defendant opened the gate behind them and started to enter the property. Both women yelled, "There he is" – identifying defendant as the individual who had assaulted Castro. At that point, defendant fled. Edwards gave chase and after two or three blocks caught up with defendant and arrested him.

At the close of the prosecution's case-in-chief, the trial court granted defense counsel's motion for a judgment of acquittal on both counts of making criminal threats in violation of section 422 (counts I & II). However, the court denied defense counsel's motion for judgment of acquittal on the assault-with-a-firearm charges.

In regard to the section 1109 evidence, the trial court specifically instructed the jury as follows: "The People presented evidence that the defendant committed domestic violence that was not charged in this case, specifically: Punched Vanessa Castro on or about November 4, 2011. [¶] *Domestic violence* means abuse committed against an adult who is a person with whom the defendant has had a child. [¶] *Abuse* means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit and did commit Assault with a Firearm, as charged here.

If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Assault with a Firearm. The People must still prove each charge of every charge beyond a reasonable doubt." (CALCRIM No. 852.)

The court also instructed the jury as follows regarding "Limited Purpose Evidence in General[:] [¶] During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other." (CALCRIM No. 303.)

The jury was provided with a copy of the jury instructions for use during deliberations.

The jury delivered its verdicts on September 17, 2013. The jury acquitted defendant of both assault-with-a-firearm charges (counts III & IV) and also returned not guilty verdicts on the lesser-included charges of simple assault. The jury returned guilty verdicts on all remaining counts and found true the special allegations associated with those counts.

After the court discharged the jury, the court informed counsel there was "an issue" with regard to the verdict form for count eight because it erroneously specified the alleged crime as concealed firearm "on the person," rather than concealed weapon "in the vehicle."[3] Noting the jury "brought in a verdict on count eight that was . . . possessing a gun on the person," the same offense as alleged in count nine, the court stated count eight "is going to have to get thrown out," adding, "I don't think it means much in the scope of

[3] The jury was properly instructed in accordance with the charging document that "defendant is charged in Count 8 with unlawfully carrying a concealed firearm within a vehicle . . . ." (CALCRIM No. 2521.) Also, the verdict form for count VIII correctly referenced section 25400, subdivision (a)(1), concealment within vehicle, but erroneously identified the alleged crime as "concealed firearm on person."

things." The minute order dated September 17, 2013, states: "The Court orders the count 8 guilty verdict STRICKEN."

On October 21, 2013, the court sentenced defendant to a prison term of three years, the upper-term for negligent discharge of a firearm (§ 246.3, subd. (a); count V) and to concurrent sentences of three years on each of the three firearm carrying convictions (counts VI, VII, & IX). Defendant filed a timely notice of appeal on October 29, 2013. The People did not file a notice of appeal.

DISCUSSION

Defendant contends the admission of evidence of his uncharged prior conduct involving domestic violence should have been excluded, requiring reversal of the convictions for weapons offenses he committed on February 10, 2013. First, defendant asserts the admission of propensity evidence pursuant to section 1109 violates the due process clause. However, in *People v. Falsetta* (1999) 21 Cal.4th 903, our Supreme Court held that section 1108 of the Evidence Code (section 1108), governing the admission of propensity evidence of other sexual offenses, "does not offend due process." (*Id.* at p. 916.) And our sister appellate courts have uniformly held *Falsetta* applies equally to section 1109, because section 1108 is a "parallel statute which addresses prior 'sexual offenses' rather than prior 'domestic violence.' " (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310; see also *People v. Johnson* (2010) 185 Cal.App.4th 520, 528-529 [collecting cases and concluding "Courts of Appeal . . . have uniformly followed the reasoning of *Falsetta* in holding section 1109 does not offend due process"].) Accordingly, we reject defendant's challenge to section 1109 under the due process clause "as having already been settled unfavorably to him." (*People v. Johnson, supra,*185 Cal.App.4th at p. 529.)

Second, defendant contends the admission of section 1109 evidence was unduly prejudicial under Evidence Code section 352 (section 352).[4] Section 352 states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "Trial courts enjoy ' "broad discretion" ' in deciding whether the probability of a substantial danger of prejudice substantially outweighs probative value. [Citations.] A trial court's exercise of discretion 'will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" (*People v. Holford* (2012) 203 Cal.App.4th 155, 167-168.)

Assuming defendant properly preserved this issue for appeal (see *People v. Holford, supra,* 203 Cal.App.4th at p. 169 ["requirement of a specific objection under section 353 applies to claims seeking exclusion under section 352"]), he has failed to show the trial court abused its discretion by admitting evidence he committed an act of domestic violence against Castro on November 4, 2011. For purposes of section 352, the *Falsetta* factors (see *Falsetta, supra,* 21 Cal.4th at p. 917) weigh in favor of the admission of the challenged propensity evidence.[5] Specifically, the section 1109

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[4] Section 1109 states in pertinent part: "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1109, subd. (a)(1).)

[5] Regarding the admission of section 1108 evidence, the Supreme Court in *Falsetta* instructed courts to "engage in a careful weighing process under section 352[,] . . . consider[ing] such factors as [the] nature, relevance, and possible remoteness [of the evidence], the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the

evidence was relevant as it involved the same victim and demonstrated defendant's propensity to act violently towards the mother of his child, and the evidence was not remote, as the prior incident of domestic violence occurred only 15 months before the offense in question took place. Also, the section 1109 evidence was not inflammatory in comparison to the conduct underlying the charge to which it was deemed relevant – assault with a firearm. Moreover, the trial judge eliminated the main potential inflammatory effect of the 911 tape played to the jury by carefully instructing the jury as follows: "I heard the tape. So it sounds like people are fighting or – just a lot of noise in the background. Don't consider that. That is not part of the evidence in this case. Only consider the actual conversation between the caller and the operator, okay. [¶] The background noise has nothing to do with this case." In sum, defendant's contention that the admission of the section 1109 evidence was unduly prejudicial under Evidence Code section 352 is without merit.[6]

Finally, the People contend the trial court erred when it dismissed defendant's conviction on count eight due to an error on the jury verdict form. Respondent acknowledges the prosecution did not file an appeal challenging the order. (See *People v. Chacon* (2007) 40 Cal.4th 558, 564 ["The prosecution's right to appeal in a criminal case

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defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Falsetta, supra,* 21 Cal.4th at p. 917.)

[6] Additionally, even if the trial court erred by admitting the section 1109 evidence, the error was harmless by any standard. (see *People v. Partida* (2005) 37 Cal.4th 428, 439 ["admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*"]; *Chapman v. California* (1967) 386 U.S. 18, 24 ["before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"].) Because the court specifically instructed the jury to consider the section 1109 evidence only for the assault-with-a-firearm charges and the jury found defendant not guilty on those charges, the section 1109 evidence had no bearing whatsoever on the jury's guilty verdicts for the offenses committed on February 10, 2013: negligently discharging a firearm (§ 246.3, subd. (a); count V); carrying a loaded firearm (§ 25850, subd. (a); count VI); and carrying a concealed firearm (§ 25400, subd. (a)(2); count VII).

is strictly limited by statute. [Citation.] . . . The circumstances allowing a People's appeal are enumerated in section 1238"].) Nevertheless, respondent asserts we may consider the issue under the authority of *People v. Bonnetta* (2009) 46 Cal.4th 143 (*Bonnetta*), holding that because the requirements of section 1385 are mandatory, not directory, a trial court must provide written reasons in its minute orders for dismissing an action or part thereof (*id.* at pp. 149-151), and that a violation of the requirement to state reasons for dismissal in writing may not be deemed harmless, even if it appears evident from the record why the court entered the dismissal (*id.* at pp. 151-152).

However, the passage in *Bonnetta* that respondent relies upon is not a source of appellate jurisdiction; rather, the *Bonnetta* court ruled only that a trial court's error in failing to state its reasons for dismissal as required under section 1385 could not be waived "by failing to remind the court of the necessity of a written order and later failing to take corrective action." (46 Cal.4th at p. 152.) Here, we do not face an issue of waiver but rather the fundamental question of whether we have appellate jurisdiction to review the error asserted by respondent. In *Bonnetta*, "[t]he People appealed" the trial court's striking of the enhancement in question. (*Id.* at p. 148.) However, because respondent failed to file a notice of appeal in this case, we conclude we lack appellate jurisdiction to consider respondent's assertion of error. (See *People v. Denham* (2014) 222 Cal.App.4th 1210, 1213 [" '[A] notice of appeal must be filed within 60 days after the rendition of the judgment or the making of the order being appealed.' (Cal. Rules of Court, rule 8.406(a)(1).) '[T]he filing of a timely notice of appeal is a jurisdictional prerequisite. "Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal." [Citations.]' [Citation.]".)

DISPOSITION

The judgment is affirmed.

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Dondero, J.

We concur:

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Humes, P.J.

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Margulies, J.